United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

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76-7083

UNITED STATES COURT OF APPEALS

For the Second Circuit

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P/S

FREQUENCY ELECTRONICS, INC.,

Plaintiff-Appellee,

-against-

NATIONAL RADIO COMPANY, INC.,

Defendant,

and

LOUIS LERNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREQUENCY ELECTRONICS, INC., Plaintiff-Appellee, -against- NATIONAL RADIO COMPANY, INC., Defendant, and LOUIS LERNER, Defendant-Appellant.	:	Docket No. 76-7083 Cal. No. 52 PETITION FOR REHEARING

TO The Honorable Judges of the United States Court of Appeals for the Second Circuit:

Louis Lerner, the defendant-appellant above named, hereby petitions for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason that the Court overlooked the main point of the appellant's argument on the issue of deceit.

Deceit under Massachusetts law must be grounded upon a misrepresentation of fact and not merely a statement of opinion, estimate or judgment. Chatham Furnace Co. v. Moffatt, 147 Mass. 403 (1888).

The District Court found:

(i) "That either Lerner or Mr. Oddi in Lerner's presence handed Bloch a memorandum (Plaintiff's Ex. 46) prepared by National's patent attorney which stated that the Zacharias patent was valid and that Hewlett-Packard was infringing it", Opinion at page 9, R. 95; and

(ii) "That he [Bloch] was worried about the patent situation and that he [Bloch] relied on the Memorandum of Patent Counsel (Plaintiff's Ex. 46). . ." Opinion at page 13, R. 99.

There is no case in Massachusetts or any other jurisdiction which holds as a matter of law that the delivery of a memorandum of law prepared by legal counsel constitutes an act of deceit or misrepresentation by the client when, as and if the opinion of legal counsel turns out to be wrong.

And yet this is the holding of the District Court.

Lerner did not misrepresent the memorandum, Plaintiff's Ex. 46, R. 456, to be anything other than what it was -- a preliminary memorandum considering the possible infringement of the Zacharias and Mainberger patents by a device manufactured by Hewlett-Packard. The memorandum was not directed to the analysis and consideration of the validity of the Zacharias patent, but was a technical discussion of the infringement by a Hewlett-Packard device. Because of Bloch's technical knowledge, the memorandum had meaning to him but little, if any, meaning to Lerner who was unfamiliar with electronics.

Contrary to the statement at page 9 of Judge Brieant's opinion, R. 95, the memorandum does not state that the Zacharias patent was valid. Implicit in the memorandum is the assumption that the Zacharias and Mainberger patents were valid. Such assumption is proper in light of the presumption of patent validity, 35 USC §282, and the various exceptions to the one-year filing requirement set forth at 35 USC §102(b).

Bloch was thoroughly familiar with the Zacharias patent. He became familiar with it ". . .at least a year before we [Frequency] entered into negotiation with National Company". R. 140. Bloch was and is an expert in the electronic field and studied the Zacharias patent, and testified that he ". . .compared the invention with existing equipment, and I have the technical background to be able to evaluate the significance of that invention". R. 140.

What Block obtained from Lerner was not a layman's opinion about the validity of the Zacharias or the other 18 patents to be assigned, but a copy of a legal memorandum on infringement of two of the 19 patents.

The sole participation in the fraud by Lerner is, according to the testimony of Bloch, the delivery over of the memorandum. Bloch on direct examination testified in answer to his counsel's question:

> "Q. And what did Mr. Lerner or Mr. Oddi say or do?

"A. * * *
"I was handed a memorandum prepared by the patent attorney outlining the strength of National's patent position."

Trial Transcript, p. 50, R. 156.

The memorandum, Plaintiff's Ex. 46, did not state National's patent position but set forth in technical language the possible infringement of the Zacharias and Mainberger patents by a device manufactured by Hewlett-Packard. R. 456.

This is not the kind of statement which under Massachusetts law constitutes a misrepresentation or is actionable in deceit. The only statement of fact made by Lerner of his own knowledge which was susceptible of actual knowledge and was not merely a matter of opinion, estimate or judgment was that the document delivered was a memorandum prepared by National's patent counsel. This statement was true and not misleading.

Indeed, the trial Court found, at page 13 of the Opinion, R. 99, that Bloch relied on the memorandum of patent counsel -- not on Lerner's statement.

The law of Massachusetts since the decision in Yorke v. Taylor, 332 Mass. 368 (1955), is the rule of the Restatement of Torts, viz.:

> "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation". Yorke v. Taylor, supra at p. 374 (emphasis added).

The memorandum of patent counsel, Plaintiff's Ex. 46, R. 456, is not a statement of fact but is a statement of opinion, estimate or judgment and the rule of Section 540 of the Restatement of Torts as adopted by Yorke v. Taylor, supra, should not be applied to relieve Frequency from a duty to inquire.

Under the applicable standards of Massachusetts law as stated in DePasquale v. Bradlee & McIntosh Co., 258 Mass. 483 (1927), no action for deceit could be maintained because National and Frequency made a bargain for the sale and purchase of National's Atomichron business without making any express warranties of patent validity in the purchase and sale agreement. The contract between the parties was the result of negotiations over several months and following several trips to National's headquarters by Bloch and others from Frequency. The omission of an express warranty of patent validity was intentional. Thus, under Massachusetts law, Frequency could not maintain an action for the same damages where some of the promises were not so embodied, by alleging the omitted promises to be fraudulent representations, and seeking recovery in tort. DePasquale v. Bradlee & McIntosh Co., supra at p. 489.

Frequency's disappointment in the business transaction should not be converted into an action for fraud and deceit. Deceit is actionable in Massachusetts only for misstatements of fact and not opinion. "The rule of law is hardly to be regretted when it is considered how easily and insensibly

words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed". Holmes, J. in Deming v. Darling, 148 Mass. 504, 506 (1889).

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and the judgment of the District Court be, upon further consideration, reversed and a new trial granted to defendant Lerner.

Respectfully submitted,

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Dated: Boston, Massachusetts
December 22, 1976

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CERTIFICATE OF SERVICE

I, Edwin J. carr, attorney for Louis Lerner, defendant-appellant, hereby certify that on December 22, 1976 I served two copies of the Petition for Rehearing of defendant-appellant Louis Lerner upon the plaintiff-appellee Frequency Electronics, Inc., by causing to be delivered by hand on said day said copies thereof to counsel of record for said plaintiff-appellee, viz:

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Edwin J. Carr

Dated: December 22, 1976